BAIL SLIP

The Appellants 1 and 2 herein 1. Abdul Khader alias Kalan 2.Ramesh Kumar @ Ramesh Accused 1 and 2 Coimbatore) were directed to be released on bail as per order of this Court dated 6.8.98 and made in CA.No.584/96.

The Appellant herein (Viz.) Durai @ Irumban (Accused 3 in SC.No.94/95 on the file of II Additional Sessions Judge, Coimbatore) was directed to be released on bail as per order of this Court dated 22.6.2001 and made in Crl.M.P.No.2484/2001 in CA.No.620/96.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.02.2005

Coram :

THE HONOURABLE MR.JUSTICE N.DHINAKAR

and

THE HONOURABLE MR.JUSTICE A.KULASEKARAN

Criminal Appeals No.584 and 620 of 1996

1. Abdul Khader alias Kalan

2. Ramesh Kumar alias Ramesh — Appellants in Crl. Appeal No.584/1996

Durai @ Irumban — Appellant in Crl. A. No.620 of 1996

v.

The State
represented by Inspector of Police,
Tiruppur South Police Station
(Cr.No.146/1995) — Respondent in both the appeals

Criminal Appeals filed against the judgment dated 28.06.1996 made in Sessions Case No.94 of 1995 on the file of the II Additional Sessions Judge, Coimbatore Division, Coimbatore.

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For Appellants in Crl.
A. No.584 of 1996 : Mr.V.K.Muthusami,
Senior Counsel for
M/s.M.M.Sundresh and
V.Bharathidasan.

For Appellant in Crl.
A. No.620 of 1996 : Mr.P.Anand

For Respondent : Mr.V.M.R.Rajendran
in both Crl.Appeals. Addl. Public Prosecutor.

JUDGMENT

(Judgment of the Court was delivered
by N.DHINAKAR, J.)

The appellants in Criminal Appeal No.584 of 1996 are accused 1 and 2 in Sessions Case No.94 of 1995 on the file of the II Additional Sessions Judge, Coimbatore and the appellant in Criminal Appeal No.620 of 1996 is the third accused in the said Sessions Case. The appellants 1 and 2 in Criminal Appeal No.584 of 1996 will, hereinafter, be referred to as the first and the second appellant and the appellant in Criminal Appeal No.620 of 1996 will, hereinafter, be referred to as the third appellant, for the sake of convenience.

2. All the three appellants were charged for the offences punishable under Sections 353, 333, 302 read with 34 and 201 of the Indian Penal Code. The allegation against them is that at midnight of 13/14.02.1995 all the three appellants assaulted one Sundaram, the deceased in this case, who was a Grade I Police Constable, with knife and aruval, thereby prevented him from discharging his duties; that they caused the death of the said Sundaram by inflicting injuries on him; and that thereafter, they set fire to the passport, summons and his identity card to screen the evidence.

3. The learned trial Judge, while acquitting all the appellants from the charge under section 201 of the Indian Penal Code, found them guilty for the offences punishable under Sections 353, 333 and 302 read with 34 of the Indian Penal Code and directed them to undergo rigorous imprisonment for one year for the offence punishable under Section 353 of the Indian Penal Code; to undergo rigorous imprisonment for five years and to pay a fine of Rs.1000/- each, carrying a default sentence of one year's rigorous imprisonment for the offence punishable under Section 333 of the Indian Penal Code and to undergo life imprisonment for the offence punishable under Section 302 read with 34 of the Indian Penal Code.

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4. The case of the prosecution is as follows:-

The deceased was a Grade I Police Constable, who was on duty at Tiruppur South Police Station on the date of occurrence. P.W.3 was a vendor of coconuts. On 13.11.1995 P.W.3 took his bed at about 11 pm in front of a temple near Noyyal river. He was not living with his parents, as he was not allowed by his father to stay in his house since in one or two occasions about five years prior to the date of the incident, he had smoked Ganja and beedi. At about midnight on 13/14.11.1995 the deceased, who was on duty with regard to serving of summons, woke P.W.3 to know about his identity. P.W.3, on being woken up, was questioned by the deceased and P.W.3 informed him that he is a vendor of tender coconuts. P.W.3 was known to the deceased and on seeing the face of P.W.3, the deceased left the place after advising him to continue to sleep and the deceased proceeded towards south. At that time, all the three appellants were seen coming in the opposite direction, by P.W.3. The deceased caught hold of appellants 1 and 2 and asked them to come to the police station. The second appellant immediately instigated the other appellants to cut the deceased. The first appellant, immediately took out a knife from his waist and cut the deceased on his left hand and the third appellant stabbed the deceased on his chest. The deceased ran towards west chased by all the three appellants. He was held by the first appellant and appellants 2 and 3 stabbed him indiscriminately. When P.W.3 switched on the torch, the first appellant threatened him to switch it off immediately. P.W.3 switched it off and left the place and went to the bus stop to take his bed.

5. P.W.1, the owner of the coffee stall at Municipality Road opened his coffee shop at about 06.00 am as usual on 14.02.1995 and he was informed by P.W.2, a barber by profession who came to his coffee stall, that he saw the body of the deceased Sundaram lying near the temple. P.Ws.1 and 2 went to the place and found the dead body with several injuries on it. As Sundaram was known to P.W.1, he immediately recognised him and went to the Tirupur South Police Station to give a complaint. On reaching the Police Station he gave an oral complaint to P.W.14, the Sub Inspector, at 08.00 am, who reduced it into writing and the same is Ex.P.1. A case in crime No.146/1995 was registered against the appellants for the offence punishable under Section 302 of the Indian Penal Code. Ex.P.23 is a copy of the printed first information report. The express reports were sent to the higher officials and the Inspector of Police was informed about the registration of the crime.

6. P.W.16, the Inspector of Police, on being informed about the crime, took up the investigation in the crime and proceeded to the place where the dead body was lying. At the place of

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occurrence he prepared an observation mahazar, Ex.P.6 and drew a rough sketch, Ex.P.27. The panchayatdhars were summoned and in their presence inquest was conducted over the body of Sundaram between 09.30 am and 1.30 pm, during which P.W.3 and others were questioned and their statements were recorded. Ex.P.28 is the inquest report. After the inquest, the body was sent to the hospital with a requisition to conduct autopsy.

7. On receipt of the request, the Assistant Surgeon, Government Headquarters Hospital, Coimbatore at Tirupur, conducted autopsy on the body of the deceased and found the following external injuries:

1. An abrasion over left sub mandibular region lateral 1/3rd with contusion 2 x 1 cm.
2. An incised wound over the Lt. infra clavicular region on middle 1/3rd direction from above downwards size 4 x 1 x 13 cm.
3. An incised wound over the lower end of sternum 3 x 2 x 7 cm going to thoracic cavity.
4. An incised wound over the lateral border of right side sternum 3 x 1 x 5 cm going downwards.
5. An incised wound over right side of lower chest 3 x 1 x 4 cm going downwards.
6. An incised wound over the epigastrium 1 cm lateral to mid line going downwards 3 x 1 x abdominal cavity.
7. An incised wound over the abdomen to the epigastrium (1 cm lateral) 4 cm below the injury No.6 omentum protruding from the abdomen size 3 x 1 x 12 cm.
8. A lacerated irregular edged wound with contusion over lateral wall of left elbow. Horizontally placed size 5 cm x 2 cm x bone deep. Flexor muscles are cut.
9. An incised wound over the left loin 2 x 1 x 7 cm going downwards.
10. An incised wound 7 cm above the injury No.9. Size 2 x 1 x 5 cm.
11. An incised wound 2 x 1 x 3 cm going downwards 1/3rd of the right upper arm.
12. An incised wound over right loin eliptical in shape 3 x 1 x abdominal cavity. Lateral abdominal wall, depth 12 cm.
13. An incised wound over right loin 3 x 1 x 4 cm seen 3 cm below the injury No.12.
14. An incised wound over the right back of lower thoracic region upper edge square shape lower edge sharp size 3 x 2 x 6 cm.
15. An incised wound over right gleuteal region 3 x 1 x 6 cm.
16. An incised wound over right ifiac fosse size 3 x 2 x

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3 cm.

17. A lacerated injury over proximal end of right index finger size 1 x 1 x bone deep.

He issued Ex.P.8, the postmortem certificate with his opinion that the deceased died on account of shock and haemorrhage due to injuries to vital organs about 12 to 16 hours prior to the autopsy.

8. P.W.16 continued with his investigation, seized the torch light, M.O.4, produced by P.W.3 under a mahazar, Ex.P.3 attested by witnesses. He also seized blood stained earth, sample earth, half burnt identity card, summons which were with the deceased, under a mahazar, Ex.P.4 attested by witnesses. He examined the witnesses and recorded their statements. He issued Ex.P.29, requisition to the Judicial Magistrate, Tiruppur, seeking permission to search the house of the second accused and after grant of such permission, searched the house at about 04.30 pm. On searching the house, he found a blood stained full arm shirt and a blood stained pant, which were seized under the house search list at 08.00 pm on the same night. He also recovered the blood stained clothes of the deceased produced by the police constable, who was present at the time of autopsy under Form 95.

9. On 21.02.1995 at about 05.30 am, on the information received about the appellants, P.W.16 along with other policemen, proceeded to Tirumurugan Poondi and near Paraikuzhi, he saw appellants 1 and 2. On seeing the police party, they ran from the place, but, they were chased and over powered. They were arrested and the second appellant gave a confession statement and pursuant to the admissible portion of the said statement, Ex.P.10, he took the police party to P.A.P. Nagar, Tiruppur and produced the knife, M.O.3, which was seized under a mahazar, Ex.P.12. The first appellant also gave a confession statement, the admissible portion of which is marked as Ex.P.11. Pursuant to the said statement, the first appellant took the police party to Sangili Pallam and from the southern side of Muthian Koil, took out M.O.1 aruval and a blood stained dhothi, M.O.17, which were seized under a mahazar, Ex.P.13.

10. As appellants 1 and 2 suffered injuries while trying to escape on account of falling down, they were referred to the Government Hospital for treatment. P.W.15 the Assistant Surgeon, Government Headquarters Hospital, Coimbatore at Tiruppur examined the second appellant and found the following injuries on him:

1. Diffuse swelling over the right dorsum of hand.
2. Swelling over the right forearm.

Ex.P.24 is the copy of the accident register. The doctor also examined the first appellant and found a diffuse swelling over the right forearm on the upper part and he issued Ex.P.25, the

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accident register in respect of the said injury. Thereafter, appellants 1 and 2 were sent to the Court for remand. On 22.02.1995 at 05.30 am, P.W.16 went to Pugalum Perumal Koil Street and arrested the third appellant. The third appellant also, on seeing the police party, tried to escape and was overpowered. P.W.16 arrested the third appellant and recorded the confession statement given by him. The admissible portion of the said statement is Ex.P.14. Pursuant to that statement, the third appellant took the police party to Municipal burial ground and took out M.O.2 blood stained knife and M.O.18, blood stained shirt and produced them which were seized under a mahazar, Ex.P.15. He was sent for medical examination. The doctor, P.W.15 examined him and found a large contusion in the mid part of the right upper arm. The doctor issued Ex.P.26, accident register, in respect of the said injury.

11. P.W.16, thereafter, questioned the witnesses in the crime on 24.02.1995 and he gave a requisition to the Judicial Magistrate to send the material objects for chemical analysis. He questioned the Village Administrative Officer and others and recorded their statements. The final report was filed on 03.04.1995.

12. The appellants were questioned under Section 313 of the Code of Criminal Procedure on the incriminating circumstances appearing against them and they denied the same.

13. D.W.1 was examined on the side of the third appellant. D.W.1, in his evidence, has stated that the third appellant was a vendor of coconuts and that on 14.02.1995 there was a tonsuring and ear boring ceremony in the house of the third appellant and that on the previous night, at about 07.00 pm the third appellant was seen in the house of the Village Headman, where he had gone to take the vessels for the ensuing function. According to D.W.1, the third appellant was with him till 02.00 am on 14.02.1995 and thereafter, he went to the third appellant's house at 08.00 am to assist him in the function and he left the place only at the noon of 14.02.1995. Exs.D.1 and D.2 were marked through D.W.1. Ex.D.1 is the invitation for the tonsuring and ear boring ceremony, according to which the ceremony was to take place at 09.00 am on 14.02.1995. Ex.D.2 is the marriage invitation of D.W.1, which shows that the marriage of D.W.1 was to take place on 20.02.1995 between 06.00 am and 07.00 am. It is the evidence of D.W.1 that the third appellant was present during his marriage on 20.02.1995 and he was taken by the police from the marriage hall.

14. Learned Senior Counsel appearing for the appellants in Criminal Appeal No.584 of 1996 and learned counsel for the appellant in Criminal Appeal No.620 of 1996 who reiterated the

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argument of the learned Senior Counsel, contended that the prosecution has relied on the testimony of P.W.3, who is an ex-convict, and his evidence is unreliable since he would be obliged to give evidence in favour of the police officers. It is the further contention of the counsel that as there was no sufficient light at the scene of occurrence, it would not have been possible for P.W.3 to identify the witnesses and therefore, the whole case of the prosecution has to be thrown out. On the contentions, we have heard the learned Additional Public Prosecutor.

15. Sundaram, the deceased in this case died on account of homicidal violence is evident from the evidence of the doctor P.W.7, and the postmortem certificate, Ex.P.8. It is also not disputed by the appellants that the deceased died on account of homicidal attack. Therefore, we hold that the said Sundaram died on account of homicidal violence.

16. The prosecution, before the trial Court, relied upon the evidence of P.W.3 to show that the accused 1 to 3 have attacked the deceased. P.W.3 during the relevant period was eking his livelihood by selling tender coconuts. According to him at about mid night on 13/14.02.1995 when he was sleeping in front of a temple, the deceased Sundaram woke him up to find out his identity and on seeing P.W.3 and on being informed that he usually sleeps there, the deceased left the temple, where P.W.3 was sleeping and went towards east. The evidence of P.W.3 further shows that he saw three persons coming in the opposite direction and that thereafter, the deceased was attacked by them. As soon as the attack commenced, the deceased ran to a distance, but the appellants who chased him overpowered him and gave indiscriminate stabs. The postmortem doctor found as many as 17 injuries on his body when he conducted the postmortem. The evidence of P.W.3 is, therefore, corroborated by the medical evidence.

17. The question that is to be decided is as to whether the evidence of P.W.3 is to be accepted. P.W.3 is no doubt a former convict. But during the relevant point of time, he had mend his ways and was eking his livelihood by selling tender coconuts. The deceased police constable after knowing about his identity, left him at the temple without asking any further questions, so that he can go back to sleep. There is no rule of law which has crystalised into a rule of prudence that the evidence of a former convict should not be accepted and there is also no embargo on the Court to act upon the sole testimony of an eye witness. In this connection, it may not be out of place for this Court to refer to Section 134 of the Indian Evidence Act, which mandates that no particular number of witnesses shall in any case be

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required for the proof of any fact.

18. The only point which the Court has to see is whether the evidence of P.W.3 is trustworthy and reliable in the absence of any evidence of corroboration, which is not required by any rule or law. As we stated earlier, P.W.3 had seen the incident and thereafter when he was examined at the time of inquest, which was conducted on the next day by P.W.16, he was able to give the details with regard to the identity of the appellants. His evidence is supported by the evidence of P.W.16, the Investigating Officer, who has stated that after conclusion of inquest he gave Ex.P.29 requisition at 2.30 pm to the Judicial Magistrate, Tirupur, requesting permission to search the house of the second appellant. If P.W.3 was not present and had not witnessed the occurrence, then, he could not have given the names of the appellants to P.W.16 and in that case, P.W.16, in turn could not have issued requisition, Ex.P.29 to the Magistrate requesting permission to search the house of the second appellant. This shows that after the occurrence, P.W.3 was examined during the inquest and that he gave all the details to the Investigating Officer, which made the Investigating Officer to seek the permission of the Judicial magistrate to search the house of the second appellant.

19. Though a serious contention was raised that the scene of occurrence was dark and P.W.3 could not have witnessed the incident as there were no sufficient light, we are unable to accept the said argument, since P.W.3, in his evidence has stated that on seeing three persons attacking the deceased, he switched on the torch and one of the appellants threatened him to switch it off and thereafter he switched off. This evidence of P.W.3 is supported by the subsequent recovery of the torch light, M.O.4 by P.W.16, when P.W.3 was questioned during the course of inquest. The said torch, M.O.4 was recovered under a mahazar, Ex.P.3. The evidence of P.W.3 is supported by the recovery of M.O.4 and search of the second appellant's house by P.W.16. Therefore, we find it difficult to reject the evidence of P.W.3 and the argument of the counsel that there are no independent eye witness is to be stated only to be rejected. It is to be remembered at this stage that as the occurrence had taken place at midnight, one cannot expect many passers-by at the scene of occurrence at that odd hour and even according to the prosecution P.W.3 happened to see the occurrence only on account of his taking bed near the temple. Therefore, the non examination of any other eye witness is not fatal to the prosecution. On going through the evidence of P.W.3, we are fully satisfied that his evidence is natural and is corroborated by other materials, which we have extracted above. We do not see any material in the cross examination for us to hold that his evidence cannot be accepted. We accept his evidence.

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20. On the side of the third appellant D.W.1 was examined. We are unable to accept the evidence of D.W.1. The evidence of D.W.1 is only to the effect that on 14.02.1995 there was a tonsuring and ear boring ceremony of the third appellant's children and that D.W.1 was present along with the third appellant from 07.00 pm on 13.02.1995 till 02.00 am on the night of 13/14.02.1995. He has also marked Ex.D.1. On going through his evidence, it could be seen that he had come out with a false version since in the cross examination he was not able to tell details regarding the tonsuring ceremony. The Court cannot attach much importance either to the invitation, Ex.D.1 or to Ex.D.2, which is the marriage invitation of D.W.1. According to D.W.1, the third appellant was present on 20.02.1995 at the marriage hall when his marriage was scheduled to take place and that the third appellant was taken from the marriage hall by the police. This self-serving statement of D.W.1 that the third appellant was present along with D.W.1 on 20.02.1995 is not supported by any material. Ex.D.1, which we have perused, shows that it is an invitation for the tonsuring and ear boring ceremony of Ramesh and Vanishre, children of R.Duraisamy and D.Shanthi. A perusal of the said invitation does even show the printer's name, who printed the invitation. The name of the third appellant is Durai @ Irumban and D.W.1, nowhere in his evidence, has stated that the third appellant's name is Duraisamy. The absence of the printer's name and the difference in the name of the third appellant would indicate that no reliance can be placed on Exs.D.1 and 2. If the third appellant has a definite case of alibi, then, it is for him to establish the said fact, in view of Section 103 of the Indian Evidence Act, which contemplates that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The illustration to the said section also shows that if one wishes the Court to believe that at the time in question he was elsewhere, he must prove. The third appellant failed to prove that he was with D.W.1, since Ex.D.1 could not be the invitation printed by the third appellant and the evidence of D.W.1, in our view, is only to lend support to the defence theory that he was elsewhere. Once the accused takes a plea of alibi he must succeed in proving that and if he fails to prove the said plea, it is to be presumed that he was only at the place of occurrence and participated in the crime along with other accused as a plea of alibi is the best of defence and at the same time, it is the worst of defence.

21. On the discussions made above, we reject the plea of the third appellant and hold that he had come with the false version by trying to show that he was elsewhere.

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22. Once we accept the evidence of P.W.3 and reject the evidence of D.W.1, then we cannot, but hold that the appellants inflicted injuries on the deceased and stabbed him to death. On the evidence let in by the prosecution we are fully satisfied that the trial Court was justified in convicting the appellants. We, therefore, confirm the conviction and sentence imposed by the the learned Sessions Judge. The appeals are dismissed.

23. It is submitted that the appellants are on bail. The learned Sessions Judge shall take steps to send the appellants to custody to serve the remaining period of sentence.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

mf

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1. II Additional Sessions Judge, Coimbatore.
2. -do- through Principal Sessions Judge, Coimbatore.
3. The Principal Sessions Judge, Coimbatore.
4. The Judicial Magistrate, Tirupur.
5. The Judicial Magistrate No.II, Tiruppur.
6. -do- through The Chief Judicial Magistrate, Coimbatore.
7. The District Collector, Coimbatore.
8. The Director General of Police, Chennai.
9. The Public Prosecutor, High Court, Madras.
10. The Superintendent of Central Prison, Coimbatore.
11. The Inspector of Police, Tirupur South Police Station, Tirupur.

+ 1 CC to Mr.P.Anand, Advocate SR NO 4412

+ 1 CC to Mr.M.M.Sundresh, Advocate SR NO 4291

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